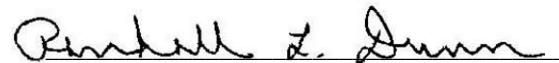


April 18, 2013

Clerk, U.S. Bankruptcy Court

Below is an Opinion of the Court.



RANDALL L. DUNN
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF OREGON

In Re:) Bankruptcy Case
RONALD WARREN JOHNSON) No. 12-36033-rlld13
VERA MORIN JOHNSON,)
Debtor.)

MARY ELIZABETH VOLM,)
Plaintiff,) Adversary Proceeding
v.) No. 12-03301-rld
RONALD WARREN JOHNSON,)
Defendant.)

On March 11, 2013, I heard argument (the "Hearing") on plaintiff Mary Elizabeth Volm's ("Ms. Volm") Motion for Summary Judgment ("SJ Motion") on her § 523(a)(6)¹ claim for relief in this adversary proceeding ("Adversary Proceeding"). Defendant Ronald Warren Johnson

¹ Unless otherwise specified, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and all "Rule" references are to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037. The Federal Rules of Civil Procedure are referred to as "Civil Rules."

1 ("Mr. Johnson") opposed the SJ Motion. Following the Hearing, I
2 authorized counsel for Mr. Johnson to file a further Declaration
3 supporting his position by March 15, 2013. I also authorized counsel for
4 Ms. Volm to file a further supporting Declaration by March 22, 2013.
5 Following the submission of the parties' further Declarations, I closed
6 the record and took the SJ Motion under advisement.

7 I have reviewed the Adversary Proceeding pleadings, including
8 the complaint and the parties' legal memoranda filed in support of and in
9 opposition to the SJ Motion. I also have reviewed their evidentiary
10 submissions and applicable authorities, both as cited to me and as
11 located through my own research. I further have taken judicial notice of
12 the docket and documents filed in Mr. Johnson's main chapter 13 case,
13 Case No. 12-36033-rlld13 ("Johnson Main Case"), for purposes of confirming
14 and ascertaining facts not reasonably in dispute. Federal Rule of
15 Evidence 201; In re Butts, 350 B.R. 12, 14 n.1 (Bankr. E.D. Pa. 2006).

16 This Memorandum Opinion sets forth my conclusions of law in
17 light of the record before me pursuant to Civil Rule 52(a), applicable in
18 this Adversary Proceeding pursuant to Rule 7052.

19 Facts

20 This narrative of background facts recounts relevant
21 information primarily relying on Ms. Volm's Concise Statement of Material
22 Facts ("Concise Statement"). However, where Mr. Johnson's Response
23 ("Response") to the Concise Statement provides conflicting information, I
24 have noted the inconsistencies. I also have looked to the Declarations
25 and documentary evidence submitted by the parties to corroborate the
26 factual statements included here. If I have determined that statements

1 included in the Concise Statement are irrelevant to the issues I must
2 decide, I have omitted any reference to such statements.

3 The claim in this Adversary Proceeding arose from an
4 unfortunate traffic incident that occurred on July 10, 2008. In
5 Paragraph 5 of the Concise Statement, Ms. Volm states that Mr. Johnson
6 was driving a sport utility vehicle-style limousine in downtown Portland
7 when he failed to navigate a turn and became stuck in an intersection.
8 As Mr. Johnson began backing up his limousine, Ms. Volm, who was riding a
9 motor scooter directly behind Mr. Johnson's vehicle, called out to Mr.
10 Johnson in an effort to stop him from running into her with the rear of
11 his vehicle. After hearing Ms. Volm call out, Mr. Johnson got out of his
12 vehicle, cursed at Ms. Volm, pushed Ms. Volm's scooter approximately nine
13 feet forward, and returned to his vehicle to attempt again to back out of
14 the intersection. Ms. Volm, who was now trapped between Mr. Johnson's
15 vehicle and oncoming traffic, became concerned that Mr. Johnson's
16 attempts to back out of the intersection would result in Mr. Johnson
17 hitting her with his vehicle. To signal her presence to Mr. Johnson and
18 prevent him from hitting her, Ms. Volm smacked the side of Mr. Johnson's
19 vehicle with her open hand. According to Ms. Volm, at that point, Mr.
20 Johnson got out of his vehicle again, took Ms. Volm by the shoulders,
21 threw her down on the ground, stood over her and threatened to punch her.

22 Mr. Johnson denies the fact allegations in paragraph 5 of the
23 Concise Statement and states that he was acting in defense of his
24 property after seeing Ms. Volm intentionally trying to damage his
25 vehicle. In a Declaration filed in the parties' state court lawsuit, Mr.
26 Johnson states that Ms. Volm kicked his limousine, and he watched her do

1 it. See Exhibit 102.

2 In paragraph 6 of the Concise Statement, Ms. Volm states that
3 Mr. Johnson admitted that during the July 2008 incident, he loudly yelled
4 profanities at Ms. Volm; he pushed her scooter forward in an attempt to
5 move Ms. Volm and her scooter out of the traffic lane; and he grabbed Ms.
6 Volm's wrist, elbow and upper arm. Mr. Johnson also admitted that he
7 threatened to punch Ms. Volm in the nose and called her a "fucking
8 bitch."

9 Mr. Johnson admits that the statements in paragraph 6 of the
10 Concise Statement are true but "are taken out of context given the
11 totality of the testimony." Mr. Johnson then reiterates that he was
12 acting to defend his property from intentional damage.

13 In April 2010, Ms. Volm filed a civil action ("Civil Action")
14 against Mr. Johnson, Volm v. Johnson, in Multnomah County Circuit Court
15 ("Circuit Court"), Case No. 100405336, alleging claims for assault,
16 battery and intentional infliction of severe emotional distress resulting
17 from the July 2008 incident. See Exhibit C.

18 Following a jury trial in May 2011, the jury returned a verdict
19 in which Mr. Johnson admits that the jury found Mr. Johnson at "fault in
20 one or more ways the plaintiff claims. . . ."²

21 On June 9, 2011, the Circuit Court entered a General Judgment
22 and Money Award ("Judgment") in the Civil Action, including the following
23 findings:

24 ² It is unclear from the record where this quotation comes from.
25 Counsel for Mr. Johnson submitted a copy of the Verdict form as Exhibit
26 101 to his Second Corrected Declaration, but the submitted Verdict form
is not filled in. See Exhibit 101, Adversary Proceeding Docket No. 33.

1 The jury found defendant liable on plaintiff's claims
2 and awarded Plaintiff \$1,500.00 in economic damages
3 and \$32,000.00 in noneconomic damages. The jury found
4 plaintiff liable on defendant's claim for property
5 damage and awarded defendant \$368.00 in economic
6 damages.

7 The Judgment provided that interest would accrue on Ms. Volm's award at
8 9% from the date of entry of the Judgment. See Exhibit D. No evidence
9 was submitted indicating that Mr. Johnson appealed the Judgment.

10 On July 29, 2011, the Circuit Court entered an order approving
11 a supplemental award ("Cost Award") of Ms. Volm's costs and attorney's
12 fees as prevailing party in the Civil Action in the amount of \$2,189.50.
13 See Exhibit E. Ms. Volm asserts that the net liability owed by Mr.
14 Johnson to Ms. Volm as a result of the Judgment and the Cost Award is
15 \$35,321.50. She further asserts that she has received payments totaling
16 \$467.45 on the Judgment and Cost Award liability. By her calculations,
17 as of December 11, 2012, Mr. Johnson owed \$34,854.05 in principal and
18 \$4,705.29 in accrued interest, a total of \$39,559.34. Mr. Johnson admits
19 these assertions of Ms. Volm but also asserts that no partial
20 satisfaction of judgment has been filed to offset the \$368 in economic
21 damages Mr. Johnson was awarded against Ms. Volm in the Judgment.

22 Mr. Johnson filed a voluntary petition for relief under chapter
23 13 on August 3, 2012. His modified chapter 13 plan was confirmed by
24 order entered on January 17, 2013. The complaint in this Adversary
25 Proceeding was timely filed on November 6, 2012. See Adversary
26 Proceeding Docket No. 1.

27 ///

28 ///

Jurisdiction

I have jurisdiction to decide the SJ Motion under 28 U.S.C. §§ 1334, 157(b)(1) and 157(b)(2)(I).

Discussion

A. Summary Judgment Standards

Granting a motion for summary judgment is appropriate only if there is no genuine dispute as to any material fact, and the moving party is entitled to judgment as a matter of law. Civil Rule 56(c); Rule 7056; State Farm Mutual Auto Ins. Co. v. Davis, 7 F.3d 180, 182 (9th Cir. 1993). "Material facts" are such facts as may affect the outcome of a case under governing law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute concerning a material fact is "genuine" only if there is sufficient evidence to justify a finding in favor of the nonmoving party. Id. However, all justifiable inferences from the evidence presented are to be considered in favor of the nonmoving party. Id. at 255.

The moving party bears the initial burden of demonstrating that there are no genuine issues of material fact. T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987). However, once the moving party has met that burden, the burden shifts to the nonmoving party to "set forth, by affidavit or as otherwise provided in Rule 56, 'specific facts showing that there is a genuine issue for trial.'" Horphaq Research Ltd. v. Garcia, 475 F.3d 1029, 1035 (9th Cir. 2006) (quoting T.W. Elec. Serv., Ltd. v. Pac. Elec. Contractors Ass'n, 809 F.2d at 630). "[M]ere allegations and speculation do not create a factual dispute for purposes of summary judgment." Nelson v. Pima

1 Community College, 83 F.3d 1075, 1081-82 (9th Cir. 1996).

2 B. Section 523(a)(6) Standards

3 Section 523(a)(6) provides an exception from a bankruptcy
4 discharge for a debt "for willful and malicious injury by the debtor to
5 another entity or to the property of another entity." The Supreme Court
6 provided a seminal authority for interpretation of § 523(a)(6) in
7 Kawaauhau v. Geiger, 523 U.S. 57 (1998), a case concerning whether a
8 medical malpractice judgment should be excepted from the debtor doctor's
9 bankruptcy discharge.

10 In interpreting § 523(a)(6) in Geiger, the Supreme Court held
11 that,

12 The word "willful" in [§ 523](a)(6) modifies the word
13 "injury," indicating that nondischargeability takes a
14 deliberate or intentional injury, not merely a
15 deliberate or intentional act that leads to injury.
Had Congress meant to exempt debts resulting from
unintentionally inflicted injuries, it might have
described instead "willful acts that cause injury."

16 Id. at 61 (emphasis in original). The Supreme Court further stated that
17 "the (a)(6) formulation triggers in the lawyer's mind the category
18 'intentional torts,' as distinguished from negligent or reckless torts."
19 Id. The Supreme Court ultimately concluded that "debts arising from
20 recklessly or negligently inflicted injuries do not fall within the
21 compass of § 523(a)(6)." Id. at 64.

22 In decisions subsequent to Geiger, the Ninth Circuit has
23 elaborated on the standards discussed by the Supreme Court and has
24 analyzed "willful" and "malicious" as two separate elements of a
25 § 523(a)(6) claim that each must be established by a preponderance of the
26 evidence. See, e.g., Grogan v. Garner, 498 U.S. 279, 286-87 (1991);

1 Carrillo v. Su (In re Su), 290 F.3d 1140, 1146 (9th Cir. 2002). For an
2 injury to be "willful," the debtor must have had a subjective motive to
3 inflict injury or must have believed that injury was substantially
4 certain to occur as a result of his or her conduct. Petralia v. Jercich
5 (In re Jercich), 238 F.3d 1202, 1208 (9th Cir. 2001). In other words,
6 the debtor must have acted with "actual knowledge that harm to the
7 creditor was substantially certain" to result. In re Su, 290 F.3d at
8 1146.

9 "Malicious" injury involves "(1) a wrongful act, (2) 'done
10 intentionally, (3) which necessarily causes injury, and (4) is done
11 without just cause or excuse.'" Murray v. Bammer (In re Bammer), 131 F.3d
12 788, 791 (9th Cir. 1997), citing Impulsora Del Territorio Sur, S.A. v.
13 Cecchini (In re Cecchini), 780 F.2d 1440, 1443 (9th Cir. 1986).

14 In light of the applicable § 523(a)(6) standards, if my sole
15 focus were on the conflicting versions of the material facts relating to
16 the incident on July 10, 2008, set forth in the Concise Statement and the
17 Response, this would not be an appropriate case for summary judgment.
18 The parties have directly conflicting interpretations of Mr. Johnson's
19 subjective intent, each with evidentiary support. However, there is no
20 genuine dispute as to the facts that the Judgment was entered and what
21 the Judgment states as to the jury's findings. Accordingly, the question
22 becomes whether summary judgment is appropriate based on the issue
23 preclusive effect of the Judgment.

24 C. Application of Issue Preclusion

25 Issue preclusion applies in exception to discharge litigation.
26 Grogan v. Garner, 498 U.S. at 284-85 n.11. Under 28 U.S.C. § 1738, the

1 Full Faith and Credit Act, I apply Oregon's issue preclusion law to
2 determine the preclusive effect of the Judgment, if any. Harmon v.
3 Kobrin (In re Harmon), 250 F.3d 1240, 1245 (9th Cir. 2001).

4 The Oregon Supreme Court set forth the test for issue
5 preclusion in Nelson v. Emerald People's Util. Dist., 318 Or. 99, 862
6 P.2d 1293, 1296-97 (1993), as follows:

7 If one tribunal has decided an issue, the decision on
8 that issue may preclude relitigation of the issue in
another proceeding if five requirements are met:

9 1. The issue in the two proceedings is identical.
10 North Clackamas School Dist. v. White, . . . 305 Or.
[48,] 53, 750 P.2d 485[, modified, 305 Or. 468
(1988)]; State Farm Fire & Cas. v. Reuter, . . . 299
11 Or. [155,] 158, 700 P.2d 236 [(1985)].

12 2. The issue was actually litigated and was essential
13 to a final decision on the merits in the prior
proceeding. Heller v. Ebb Auto Co., 308 Or. 1, 5, 774
P.2d 1089 (1989).

14 3. The party sought to be precluded has had a full
15 and fair opportunity to be heard on that issue.
Chavez v. Boise Cascade Corporation, 307 Or. 632, 635,
16 772 P.2d 409 (1989); State v. Ratliff, . . . 304 Or.
[254,] 258, 744 P.2d 247 [(1987)].

17 4. The party sought to be precluded was a party or
18 was in privity with a party to the prior proceeding.
North Clackamas School Dist. v. White, . . . 305 Or.
19 at 53, 750 P.2d 485; State Farm Fire & Cas. v. Reuter,
. . . 299 Or. at 159, 700 P.2d 236.

20 5. The prior proceeding was the type of proceeding to
21 which this court will give preclusive effect. North
Clackamas School Dist. v. White, . . . 305 Or. at 52,
22 750 P.2d 485; State v. Ratliff, . . . 304 Or. at 258,
744 P.2d 247.

23 (Emphasis in original.)

24
25 Based on the record submitted by the parties, I agree with Ms.
26 Volm that the issues of Mr. Johnson's intent and causation of Ms. Volm's

1 injuries were actually litigated in the Civil Action and that Mr. Johnson
2 had a full and fair opportunity to be heard on those issues in the Civil
3 Action. I also agree with Ms. Volm that she and Mr. Johnson were the
4 very same parties opposing one another in the Civil Action and in this
5 Adversary Proceeding and that the Judgment in the Civil Action would be
6 given preclusive effect, to the extent appropriate, under Oregon law.
7 Accordingly, there is no genuine dispute that four of the five
8 requirements for the application of issue preclusion under Oregon law
9 apply here.

10 The focus of the parties' dispute is the first Oregon law
11 requirement for the application of issue preclusion, that "[t]he issue in
12 the two proceedings is identical." Id. at 1296. Mr. Johnson first
13 argues that "without specific findings from the jury verdict, there
14 cannot be issue preclusion as to the elements of intent and
15 malice" Defendant's Memorandum Opposing SJ Motion, at 6. While
16 admitting in the Response that the jury in the Civil Action found Mr.
17 Johnson "at fault in one or more ways" on Ms. Volm's claims, the Verdict
18 form submitted as Mr. Johnson's Exhibit 101 is not completed. So, from
19 the record submitted by the parties, I have no way of determining exactly
20 what the jury determined in the Civil Action. However, that is not
21 dispositive. The judge in Circuit Court did know what the jury
22 determined, and, in the Judgment, the Circuit Court specifically
23 concluded that "[t]he jury found defendant liable on [Ms. Volm's]
24 claims."

25 Since the Judgment does not differentiate among Ms. Volm's
26 claims in making the awards of damages, the question then becomes whether

1 the standards for an exception to discharge under § 523(a)(6) are
2 satisfied by a judgment as to each and all of the claims for relief
3 stated in Ms. Volm's complaint in the Civil Action.

4 In analyzing this question, I note that it is unlikely to the
5 point of impossibility that the elements of a particular state law
6 intentional tort claim will line up exactly with the elements of the
7 "willful" and "malicious" standards under § 523(a)(6) as specified by the
8 Ninth Circuit. However, the real issue is whether the elements of Ms.
9 Volm's state law claims are essentially congruent with the § 523(a)(6)
10 standards, justifying the entry of an exception to discharge judgment
11 consistent with the teachings of Geiger and its progeny. See, e.g.,
12 Black and Chernine v. Bonnie Springs Family Ltd. Partnership et al. (In
13 re Black and Chernine), 487 B.R. 202 (9th Cir. BAP 2013).

14 Ms. Volm stated claims for assault, battery and intentional
15 infliction of severe emotional distress in her complaint in the Civil
16 Action. Under Oregon law, an assault "is an intentional attempt to do
17 violence to the person of another coupled with present ability to carry
18 the intention into effect." Cook v. Kinzua Pine Mills Co., 207 Or. 34,
19 293 P.2d 717, 723 (1956), citing State v. Olsen, 138 Or. 666, 7 P.2d 792
20 (1932). A battery is "a voluntary act that is intended to cause the
21 resulting harmful or offensive contact." Walthers v. Gossett, 148 Or.
22 App. 548, 941 P.2d 575, 578 (1997), citing Bakker v. Baza'r, Inc., 275
23 Or. 245, 249, 551 P.2d 1269 (1976); and Brown v. Far West Federal, 66 Or.
24 App. 387, 390, 674 P.2d 1183 (1984). In McGanty v. Staudenraus, 321 Or.
25 532, 901 P.2d 841, 849 (1995), the Oregon Supreme Court stated the
26 elements for a claim of intentional infliction of severe emotional

1 distress as follows:

2 "To state a claim for intentional infliction of severe
3 emotional distress, a plaintiff must plead that (1)
4 the defendant intended to inflict severe emotional
5 distress on the plaintiff, (2) the defendant's acts
6 were the cause of the plaintiff's severe emotional
distress, and (3) the defendant's acts constituted an
extraordinary transgression of the bounds of socially
tolerant conduct." Sheets v. Knight, 308 Or. 220,
236, 779 P.2d 1000 (1989).

7 In McGanty, the Oregon Supreme Court went on to state that "to satisfy
8 the intent element of this tort, a plaintiff must allege that the
9 defendant acted with the purpose of inflicting severe emotional or mental
10 distress on the plaintiff. 'It is not enough that [the defendant]
11 intentionally acted in a way that causes such distress.' Patten v. J.C.
12 Penney Co., 301 Or. 117, 122, 719 P.2d 854 (1986)." Id.

13 Common to each of the three claims asserted by Ms. Volm in the
14 Civil Action is a requirement that she establish that Mr. Johnson
15 intended to inflict injury on her in order to prevail. I conclude that
16 such requirements equate with a subjective intent to inflict injury for
17 purposes of establishing the "willful" element under § 523(a)(6).
18 Accordingly, I further conclude that the Judgment finding Mr. Johnson
19 liable on Ms. Volm's claims is preclusive on the issue of "willfulness"
20 under § 523(a)(6).

21 The analysis for purposes of establishing "malice" under
22 § 523(a)(6) is less straightforward but no less conclusive. Again,
23 common to each of the three claims asserted by Ms. Volm against Mr.
24 Johnson in the Civil Action was that he acted intentionally to inflict
25 injury that, in fact, resulted to Ms. Volm. Assault, battery and
26 intentional infliction of severe emotional distress are intentional torts

under Oregon law that by their very natures are inherently wrongful acts. Thus, three of the four standards for "malice" under Bammer are accounted for.

4 Mr. Johnson argues that he acted to defend his limousine from
5 intentional damage, and in that context, his actions were justified and
6 should be excused. The jury's finding, reflected in the Judgment, in Mr.
7 Johnson's favor on his claim for property damage, awarding offsetting
8 damages of \$368, lends limited support to his argument. However, the
9 jury's further findings, again reflected in the Judgment, that Ms. Volm
10 was entitled to \$1,500 in economic damages and \$32,000 in noneconomic
11 damages are so disproportionate in the aggregate to Mr. Johnson's
12 property damage award that, to me, the conclusion is inescapable that the
13 jury ultimately determined that Mr. Johnson's conduct in dealing with Ms.
14 Volm was "without just cause or excuse." In other words, Mr. Johnson's
15 concern for damage to his vehicle may have justified some action to
16 prevent further damage from occurring, but the jury determined in the
17 Civil Action that Mr. Johnson's conduct toward Ms. Volm escalated way
18 beyond what was reasonably justified under the circumstances.
19 Accordingly, I conclude that the Judgment is preclusive on the
20 § 523(a)(6) element of "malice" as well as "willfulness."

Conclusion

22 My ultimate conclusion, based on the foregoing analysis of the
23 record presented to me and applicable law, is that Ms. Volm has
24 established the issue preclusive effects of the Judgment in the Civil
25 Action with respect to the required elements of her claim for relief
26 under § 523(a)(6) in the Adversary Proceeding. There are no genuine

1 issues of material fact militating against the entry of summary judgment.
2 Accordingly, I will grant the SJ Motion. Within ten (10) days of the
3 entry of this Memorandum Opinion, Mr. Wilner-Nugent should submit a
4 consistent order and judgment.

5 ####

6 cc: Bear Wilner-Nugent, Esq.
7 Steven C. Burke, Esq.

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